

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

_____)	
IN THE MATTER OF)	
)	
WHEELABRATOR ENVIRONMENTAL SYSTEM INC.)	ORDER RESPONDING TO
WHEELABRATOR CONCORD COMPANY)	PETITION REQUESTING
CONCORD, NEW HAMPSHIRE)	OBJECTION TO THE ISSUANCE OF
PERMIT No. TV-0032)	A TITLE V OPERATING PERMIT
)	
ISSUED BY THE NEW HAMPSHIRE DEPARTMENT)	
OF ENVIRONMENTAL SERVICES)	
_____)	

ORDER DENYING PETITION FOR OBJECTION TO PERMIT

I. INTRODUCTION

The U.S. Environmental Protection Agency (EPA) received a petition dated March 14, 2019, (the Petition), from Anthony Caplan, Katherine Lajoie, Rebecca MacKenzie, and Janet Ward (the Petitioners), pursuant to section 505(b)(2) of the Clean Air Act (CAA or Act), 42 United States Code (U.S.C.) § 7661d(b)(2). The Petition requests that the EPA Administrator object to operating permit No. TV-0032 proposed on November 29, 2018, (the Permit) by the New Hampshire Department of Environmental Services (NHDES) to Wheelabrator Environmental System, Inc. for its Wheelabrator Concord facility (the Facility). This operating permit was issued pursuant to title V of the CAA, CAA §§ 501–507, 42 U.S.C. §§ 7661–7661f, and N.H. Code Amin. R. Env-A 600. *See also* 40 Code of Federal Regulations (C.F.R.) part 70 (title V implementing regulations). This type of operating permit is also referred to as a title V permit or part 70 permit.

Based on a review of the Petition and other relevant materials, including the Permit, the permit record, and relevant statutory and regulatory authorities, and as explained further in Section IV below, the EPA denies the Petition requesting an EPA objection.

II. STATUTORY AND REGULATORY FRAMEWORK

A. Title V Permits

Section 502(d)(1) of the CAA, 42 U.S.C. § 7661a(d)(1), requires each state to develop and submit to the EPA an operating permit program to meet the requirements of title V of the CAA and the EPA’s implementing regulations at 40 C.F.R. part 70. New Hampshire originally submitted its title V program governing the issuance of operating permits on October 26, 1995, with supplemental materials submitted on May 14, 2001. The EPA granted full approval of New Hampshire’s title V program on September 24, 2001. 66 Fed. Reg. 48806. This program, which

became effective on November 23, 2001, is codified at N.H. Code R. Admin. Env-A 600.

All major stationary sources of air pollution and certain other sources are required to apply for and operate in accordance with title V operating permits that include emission limitations and other conditions as necessary to assure compliance with applicable requirements of the CAA, including the requirements of the applicable implementation plan. CAA §§ 502(a), 503, 504(a), 42 U.S.C. §§ 7661a(a), 7661b, 7661c(a). The title V operating permit program generally does not impose new substantive air quality control requirements, but does require permits to contain adequate monitoring, recordkeeping, reporting, and other requirements to assure compliance with applicable requirements. 57 Fed. Reg. 32250, 32251 (July 21, 1992); *see* CAA § 504(c), 42 U.S.C. § 7661c(c). One purpose of the title V program is to “enable the source, States, EPA, and the public to understand better the requirements to which the source is subject, and whether the source is meeting those requirements.” 57 Fed. Reg. at 32251. Thus, the title V operating permit program is a vehicle for compiling the air quality control requirements as they apply to the source’s emission units and for providing adequate monitoring, recordkeeping, and reporting to assure compliance with such requirements.

B. Review of Issues in a Petition to Object

State and local permitting authorities issue title V permits pursuant to their EPA-approved title V programs. Under CAA § 505(a), 42 U.S.C. § 7661d(a), and the relevant implementing regulations found at 40 C.F.R. § 70.8(a), states are required to submit each proposed title V operating permit to the EPA for review. Upon receipt of a proposed permit, the EPA has 45 days to object to final issuance of the proposed permit if the EPA determines that the proposed permit is not in compliance with applicable requirements under the Act. CAA § 505(b)(1), 42 U.S.C. § 7661d(b)(1); *see also* 40 C.F.R. § 70.8(c). If the EPA does not object to a permit on its own initiative, any person may, within 60 days of the expiration of the EPA’s 45-day review period, petition the Administrator to object to the permit. CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d).

Such petitions shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting authority, unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period. CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d). In response to such a petition, the Act requires the Administrator to issue an objection if a petitioner demonstrates that a permit is not in compliance with the requirements of the Act. CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(c)(1).¹ Under section 505(b)(2) of the Act, the burden is on the petitioner to make the required demonstration to the EPA.² The petitioner’s demonstration burden is a critical component of CAA § 505(b)(2). Certain aspects of the petitioner’s

¹ *See also New York Public Interest Research Group, Inc. v. Whitman*, 321 F.3d 316, 333 n.11 (2d Cir. 2003) (*NYPIRG*).

² *WildEarth Guardians v. EPA*, 728 F.3d 1075, 1081–82 (10th Cir. 2013); *MacClarence v. EPA*, 596 F.3d 1123, 1130–33 (9th Cir. 2010); *Sierra Club v. EPA*, 557 F.3d 401, 405–07 (6th Cir. 2009); *Sierra Club v. Johnson*, 541 F.3d 1257, 1266–67 (11th Cir. 2008); *Citizens Against Ruining the Environment v. EPA*, 535 F.3d 670, 677–78 (7th Cir. 2008); *cf. NYPIRG*, 321 F.3d at 333 n.11.

demonstration burden are discussed below. A more detailed discussion can be found in *In the Matter of Consolidated Environmental Management, Inc., Nucor Steel Louisiana*, Order on Petition Nos. VI-2011-06 and VI-2012-07 at 4–7 (June 19, 2013).

The EPA considers a number of criteria in determining whether a petitioner has demonstrated noncompliance with the Act. For example, one such criterion is whether the petitioner has addressed the state or local permitting authority’s decision and reasoning. The EPA expects the petitioner to address the permitting authority’s final decision, and the permitting authority’s final reasoning (including the state’s response to comments), where these documents were available during the timeframe for filing the petition.³ Another factor the EPA examines is whether a petitioner has provided adequate analyses and citations to support its claims.⁴ Relatedly, the EPA has pointed out in numerous previous orders that general assertions or allegations did not meet the demonstration standard.⁵ Also, the failure to address a key element of a particular issue presents further grounds for the EPA to determine that a petitioner has not demonstrated a flaw in the permit.⁶

The information that the EPA considers in making a determination whether to grant or deny a petition submitted under 40 C.F.R. § 70.8(d) on a proposed permit generally includes, but is not limited to, the administrative record for the proposed permit and the petition itself, including attachments to the petition. The administrative record for a particular proposed permit includes the draft and proposed permits; any permit applications that relate to the draft or proposed permits; the statement of basis for the draft and proposed permits; the permitting authority’s written responses to comments, including responses to all significant comments raised during the public participation process on the draft permit; relevant supporting materials made available to the public according to 40 C.F.R. § 70.7(h)(2); and all other materials available to the permitting authority that are relevant to the permitting decision and that the permitting authority made available to the public according to § 70.7(h)(2). If a final permit and a statement of basis for the final permit are available during the agency’s review of a petition on a proposed permit, those documents may also be considered as the EPA determines whether to grant or deny the petition.

³ See *MacClarence*, 596 F.3d at 1132–33; see also, e.g., *Finger Lakes Zero Waste Coalition v. EPA*, 734 Fed. Appx. *11, *15 (2d Cir. 2018) (summary order); *In the Matter of Noranda Alumina, LLC*, Order on Petition No. VI-2011-04 at 20–21 (December 14, 2012).

⁴ See *MacClarence*, 596 F.3d at 1131; see also *In the Matter of Portland Generating Station*, Order on Petition at 7 (June 20, 2007).

⁵ See, e.g., *In the Matter of Luminant Generation Co., Sandow 5 Generating Plant*, Order on Petition Number VI-2011-05 at 9 (January 15, 2013); see also *In the Matter of Murphy Oil USA, Inc.*, Order on Petition No. VI-2011-02 at 12 (September 21, 2011) (denying a title V petition claim where petitioners did not cite any specific applicable requirement that lacked required monitoring); *In the Matter of Portland Generating Station*, Order on Petition at 7 (June 20, 2007) (“[C]onclusory statements alone are insufficient to establish the applicability of [an applicable requirement.]”); *In the Matter of BP Exploration (Alaska) Inc., Gathering Center #1*, Order on Petition Number VII-2004-02 at 8 (April 20, 2007); *In the Matter of Georgia Power Company*, Order on Petitions at 9–13 (January 8, 2007); *In the Matter of Chevron Products Co., Richmond, Calif. Facility*, Order on Petition No. IX-2004–10 at 12, 24 (March 15, 2005).

⁶ See, e.g., *In the Matter of EME Homer City Generation LP and First Energy Generation Corp.*, Order on Petition Nos. III-2012-06, III-2012-07, and III-2013-02 at 48 (July 30, 2014).

III. BACKGROUND

A. The Wheelabrator Concord Facility

Wheelabrator Concord operates two large municipal waste combustors at the Facility. Wheelabrator Concord burns municipal solid waste in two identical mass burn waterwall boilers to generate steam. Each boiler is equipped with two auxiliary propane-fired burners. A single steam-driven turbine/generator uses the steam to generate electricity for sale to the local utility. The gross generating capacity of the turbine/generator is 16 megawatts.

Pollution control equipment for each boiler includes selective non-catalytic reduction with urea injection for control of nitrogen oxides (NO_x), a powdered activated carbon injection system for the control of mercury, a spray dryer absorber for the control of acid gases, namely sulfur dioxide (SO₂) and hydrogen chloride, and a baghouse for the control of particulate matter and metals. Each boiler stack is equipped with a continuous emissions monitoring system to measure NO_x, SO₂, carbon monoxide and opacity. Parametric monitoring systems are also used to monitor process conditions, including sorbent injection rates for the activated carbon and spray dryer systems. The quenched bottom ash is transported via a drag conveyor to an ash handling room. The ash is loaded into containers and stored under cover until it is transported to a landfill.

B. Permitting and Petition History

On October 23, 2009, NHDES issued Title V Operating Permit TV-0032 to Wheelabrator Concord. Wheelabrator Concord submitted a title V renewal application on April 15, 2014. NHDES issued notice of the draft title V permit renewal on July 6, 2017, subject to a public comment period that ended on August 7, 2017. No comments were received during the first comment period. At the request of the public, NHDES provided for a second public comment period from August 22, 2017 to September 21, 2017. NHDES then extended the public comment period to November 14, 2017 and held a public hearing on November 7, 2017. NHDES transmitted the proposed title V renewal permit along with a document titled “Finding of Facts,” which contained its response to public comments (RTC), to the EPA on November 29, 2018. The EPA’s 45-day review of the proposed permit ended on January 14, 2019, during which time the EPA did not object to the Permit. NHDES issued the final Permit on January 24, 2019. The Petition was received on March 14, 2019, which was within 60 days of the expiration of the EPA’s 45-day review period.

IV. DETERMINATIONS ON CLAIMS RAISED BY THE PETITIONERS

Petitioners’ Claims: The Petitioners generally claim that the EPA should object to the Permit because NHDES has violated its statutory responsibility and failed to protect public health. In support of their claim, the Petitioners refer to three exhibits that relate to the Petitioners’ state-level administrative appeal of the Permit⁷ and a fourth exhibit that is a letter to the Attorney

⁷ Notice of Appeal, Anthony Caplan, et al. Appeal, Docket No. 18-02 ARC, Air Resource Council (February 1, 2018) (Exhibit 1); Appellant’s Response to Wheelabrator’s Prehearing Conference Memorandum Dated May 4, 2018, Anthony Caplan, et al. Appeal, Docket No. 18-02 ARC, Air Resources Council (June 1, 2018) (Exhibit 2);

General of New Hampshire concerning the Permit.⁸ The Petitioners assert that these four exhibits provide additional support for their claims below. Petition at 4.

The Petitioners' first claim that operation of the Wheelabrator Concord incinerator violates RSA 125-C, Title 10 Public Health, Chapter 125-C Air Pollution Control, Section 125-C:1, which the Petitioners claim requires New Hampshire to "'promote the public health, welfare, and safety' and 'prevent injury or detriment to human, plant, and animal life, physical property and other resources [emphasis added].'" *Id.* at 3. The Petitioners contend that the continued operation of the "Wheelabrator incinerator does neither." *Id.* at 3; *see also* Exhibit 1 at 6, 10, 11; Exhibit 2 at 4. The Petitioners assert that the Facility releases persistent toxic substances, such as lead, mercury, cadmium, and dioxin, that "accumulate in our bodies (known as body burden) and in our environment (known as toxic loading) and cause harm in low doses." Petition at 3, Exhibit 1 at 4.

The Petitioners next state that "[s]napshot testing of smokestack emissions can neither determine nor ensure continuous compliance with air standards that are themselves not health based." Petition at 3.; *see also* Exhibit 1 at 6; Exhibit 2 at 4. The Petitioner also claims that "NHDES has discretionary authority to either deny or approve a Title V permit and is not constrained by a requirement to only consider whether Wheelabrator's stack test results comply with emission standards." Petition at 3; *see also* Exhibit 1 at 3; Exhibit 2 at 3.

The Petitioners assert that Wheelabrator Concord "violated state and federal law and its solid waste permit by incinerating thousands of used baghouse filters" in the Facility's boilers. Petition at 3; *see also* Exhibit 1 at 8; Exhibit 2 at 4; Exhibit 3 at 8.

Finally, the Petitioners contend that NHDES has mischaracterized its authority under RSA 125-C:13 and CAA § 129(e) and that NHDES can deny, suspend, or revoke the Permit, or order measures beyond existing emission limitations to protect public health. Petition at 4–5; Exhibit 3 at 3–7.

EPA's Response: For the following reasons, the EPA denies the Petitioners' request for an objection.

With regard to all issues raised in the Petition, the Petitioners' arguments are general, conclusory, and unsupported, and the Petitioners accordingly have not met their burden of demonstrating noncompliance with the CAA.⁹

First, with respect to the Petitioners' statement that NHDES has violated the general statutory provision, RSA 125-C:1 because the "incinerator continuously releases persistent toxic substances to the air and to the ash," the Petitioners fail to demonstrate that this provision of state law is derived from or implements a federal applicable requirement. RSA 125-C:1 provides:

Motion for Reconsideration, Anthony Caplan, et al. Appeal, Docket No. 18-02 ARC, Air Resources Council, (October 5, 2018) (Exhibit 3)

⁸ Letter from Anthony Caplan, Katherine Lajoie, Rebecca MacKenzie, and Janet Ward to Jon Lavallee, Attorney General, New Hampshire Department of Justice (February 12, 2019) (Exhibit 4).

⁹ *See supra* note 5 and accompanying text.

Declaration of Policy and Purpose. It is hereby declared to be the public policy of the state of New Hampshire and the purpose of this chapter to achieve and maintain a reasonable degree of purity of the air resources of the state so as to promote the public health, welfare, and safety, prevent injury or detriment to human, plant, and animal life, physical property and other resources, foster the comfort and convenience of the people, promote the economic and social development of this state and to facilitate the enjoyment of the natural attractions of the state.

This provision serves as a broad, sweeping “declaration of policy and purpose” to the entire chapter on air pollution control and does not establish any specific applicable requirements on its face. RSA 125-C:1. The EPA has previously determined that these types of broad provisions do not generally require states to establish emission limits or monitoring at a source. *See, e.g., In the Matter of ABC Walter Coke*, Order on Petition Nos. IV-2014-5 and IV-2014-6 (July 15, 2016) at 9–11; *In the Matter of Hercules, Inc.*, Order on Petition No. IV-2003-1 (November 10, 2004) at 6–9 (concluding that the petitioners had not demonstrated that the permitting authority was required to add emission limits or standards to a permit to address a broadly worded SIP provision prohibiting emissions of injurious air pollution); *In the Matter of Transalta Centralia Generation, LLC*, Order on Permit No. SW98-8-R3 (April 28, 2011) at 7–8. In this case, the Petitioners do not even claim that RSA 125-C:1 requires NHDES to establish any particular emission limit, monitoring, recordkeeping, or reporting under the CAA. Rather, the Petitioners only assert that the operation of Wheelabrator Concord neither prevents harm nor promotes public health. Petition at 3. This general statement does not demonstrate that the Permit fails to meet applicable requirements. Further, the exhibits referenced by the Petitioners provide no additional analysis of permit terms or any applicable requirements. The Petitioners’ arguments comprise very brief, conclusory allegations, unsupported by citation to any regulatory authority or analysis of any permit terms. This type of general, conclusory allegation is insufficient to demonstrate that the Permit does not comply with, or assure compliance with, applicable requirements of the Act.¹⁰

To the extent the Petitioners are claiming that NHDES should establish new additional emission limits for pollutants such as lead, mercury, cadmium, or dioxin to protect public health, the Petitioners have not demonstrated that any such additional limits are necessary to bring the Permit into compliance with the CAA, and such a claim would be beyond the scope of this current title V action. *See In the Matter of Hyland Facility Associates Hyland Landfill*, Order on Petition No. II-2016-3 (April 10, 2019) at 5; *In the Matter of Waupaca Foundry, Inc. Plant 1*, Order on Petition No. V-2015-02 at 8 (July 14, 2016); *In the Matter of U.S. Dep’t of Energy Hanford Operations*, Order on Petition Nos. X-2014-01 and X-2013-01 at 27–28 (May 28, 2015).

The Petitioners also claim that the state ignored its authority to deny, revoke, or suspend the Permit or to order measures beyond existing emission limitations under state law, citing RSA 125-C:13. Petition at 4–5. Although not identified in the Petition, the Petitioners also cite the state’s authority under CAA § 129(e) in Exhibit 3, Motion for Reconsideration before New

¹⁰ *See supra* note 5 and accompanying text.

Hampshire’s Air Resources Council. Exhibit 3, at 3–7. According to the Petitioners, state law authorizes the permitting authority to include measures or take action on permits beyond existing applicable requirements where certain determinations have been made, such as the source will contribute disproportionately to pollution or will cause an endangerment to public health. *See, e.g.,* RSA 125-C:13(I)(b). Further, under CAA § 129(e), the EPA or a state “shall require the owner or operator of any unit to comply with emissions limitations or implement any other measures, if the Administrator or the state determines that emissions in the absence of such limitations or measures may reasonably be anticipated to endanger public health or the environment. The Administrator’s determination under the preceding sentence is a discretionary decision.” 42 U.S.C. § 7429(e). However, the Petitioners have not demonstrated that either state or federal authorities have made any such predicate determinations for Wheelabrator Concord under the standards set forth by these provisions of state and federal law. Therefore, even if the State possesses authority to order or take measures beyond existing applicable requirements through its permitting process on the basis of such a determination, this in itself does not provide grounds for the EPA to object to the Permit for failure to include “applicable requirements” under CAA § 505(b)(2).

Regarding the Petitioners’ statements related to stack testing and NHDES’s authority to deny or approve a title V permit, the Petitioners do not identify—much less demonstrate—any emission limits or applicable requirements in the Permit related to stack testing that are inadequate or explain why the stack testing in the Permit does not comply with the requirements of the Act. Further, the Petitioners discussion about NHDES’s authority under state law to deny or approve a permit does not identify a flaw in the Permit. As noted above, these brief, conclusory allegations, unsupported by citation to any applicable or controlling regulatory authority or analysis of permit terms, are insufficient to demonstrate that the Permit does not comply with, or assure compliance with, applicable requirements of the Act.¹¹ In addition, the Petitioners did not address NHDES’s final reasoning in the RTC, which explained that continuous parametric monitoring (e.g., the carbon injection rate), combined with periodic stack testing, was sufficient to assure compliance. *See* RTC at 14.¹²

With respect with the Petitioners’ claims that Wheelabrator Concord violated federal and state solid waste regulations and the source’s solid waste permit by burning baghouse filters in the boilers, the Petitioners have not identified any CAA applicable requirements with which the Permit allegedly does not comply. *See In the Matter of Suncor Energy*, Order on Petition No. VIII-2018-5 at 7 (December 20, 2018); *In the Matter of Gateway Generating Station*, Petition No. IX-2013-1 at 12–14 (October 15, 2014) (“Gateway Order”) (finding that a petitioner cannot demonstrate that the permit is not in compliance with the CAA simply by alleging noncompliance with a separate environmental statute). Here, the Petitioners’ claim appears to be based on Wheelabrator Concord’s alleged violation of their solid waste permit or unspecified federal or state solid waste regulations. Thus, the Petitioners’ claim is not based on any alleged substantive deficiency in the Permit, or any alleged procedural deficiency in NHDES’s processing of the Permit, as required by CAA § 505(b)(2). *See Gateway Order* at 13. Even if the Petitioners demonstrated that Wheelabrator Concord violated its solid waste permit or federal or state solid waste regulations, the state’s solid waste permit and regulations are outside the scope

¹¹ *See supra* note 5 and accompanying text.

¹² *See supra* note 3 and accompanying text.

of this permitting action and do not demonstrate a flaw in the title V permit under the CAA. To the extent the Petitioners are claiming that Wheelabrator Concord violated its title V Permit by burning the baghouse filters, the Petitioners have provided no evidence or identified a relevant permit term or applicable requirement.¹³ Conclusory allegations unsupported by citation to any regulatory authority or analysis of any permit terms are insufficient to demonstrate that the Permit does not comply with, or assure compliance with, applicable requirements of the Act.¹⁴

In summary, the Petitioners neither identify any applicable requirements with which the Permit does not comply or assure compliance, nor do the Petitioners identify any specific permit terms that do not comply with the requirements of the Act. The Petitioners' claims fail to demonstrate any basis for an EPA objection. For the foregoing reasons, the EPA denies the Petitioners' request for an objection.

V. CONCLUSION

For the reasons set forth above, I hereby deny the Petition as described above.

Dated: OCT 30 2019



Andrew R. Wheeler
Administrator

¹³ In addition, the Petitioners did not address New Hampshire's RTC, which explained that Wheelabrator Concord stopped burning baghouse filters in 2010 and that the title V permit in effect from 1996 through 2010 did not prohibit the burning of the baghouse filters. See RTC at 9; *supra* note 3 and accompanying text.

¹⁴ See *supra* notes 5 and accompanying text.